

COPYRIGHT LAW — FAIR USE — SOUTHERN DISTRICT OF NEW YORK HOLDS THAT FAIR USE MAY BE RAISED ON A RULE 12(B)(6) MOTION TO DISMISS. — *Brody v. Fox Broadcasting Co.*, No. 22cv6249, 2023 WL 2758730 (S.D.N.Y. Apr. 3, 2023).

As an affirmative defense,¹ fair use is not typically a ground to dismiss a copyright infringement claim on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure² (FRCP). However, a modern trend recognizes affirmative defenses raised in a 12(b)(6) motion “when the defect appears on the face of the complaint.”³ Recently, in *Brody v. Fox Broadcasting Co.*,⁴ the U.S. District Court for the Southern District of New York held that fair use was an appropriate ground to dismiss a copyright infringement claim under Rule 12(b)(6).⁵ Following the modern trend, this decision is more doctrinally consistent with the purposes of fair use and, in the news reporting context, may help protect journalism during a period of declining press freedom.

As thousands of rioters sieged the U.S. Capitol on January 6, 2021, Robyn Brody, a freelance photojournalist, filmed the attack.⁶ Brody owned the copyright to a motion picture she produced of this footage, which included imagery of Kelly Meggs, then leader of the Oath Keepers organization, on the stairs of the Capitol building.⁷ Later, in February 2021, the government charged Meggs with offenses related to his participation in the January 6 insurrection.⁸ The criminal complaint filed against Meggs featured a screenshot that the FBI took from Brody’s footage.⁹ The screenshot showed Meggs in a military “stacked formation,” which the FBI highlighted by superimposing an oval around the formation.¹⁰

One year after the insurrection, a reporter at Fox 35, a local television station operating out of Orlando, Florida, interviewed Meggs.¹¹ Meggs was imprisoned at the time for the aforementioned federal criminal charges.¹² Two Fox 35 news segments aired the interview with Meggs.¹³ During one broadcasted news segment, Fox 35 showed a cropped,

¹ Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 176 (2d Cir. 2018) (“Fair use is an affirmative defense . . .”).

² FED. R. CIV. P. 12(b)(6).

³ 5 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1226 (4th ed. 2023) [hereinafter WRIGHT & MILLER].

⁴ No. 22cv6249, 2023 WL 2758730 (S.D.N.Y. Apr. 3, 2023).

⁵ *Id.* at *1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

slow-motion scroll over the FBI’s screenshotted image with the red oval for ten seconds.¹⁴ A screenshot of the criminal complaint featuring the full FBI image was shown later in the broadcast.¹⁵ In the other broadcasted news segment, the full FBI image with the red oval was shown for sixteen seconds.¹⁶ Notably, each time the FBI image was shown, it was accompanied by a voiceover of the news reporter discussing Meggs’ indictment, how federal prosecutors identified Meggs in the stack formation, and the framing of the government’s perception of Meggs’ activities in the indictment.¹⁷ The news segments were later also featured on Fox 35’s website alongside an article titled “Capitol Riot Suspect, Leader of the Oath Keepers Speaks from D.C. Jail.”¹⁸

Brody sued Fox Broadcasting Company for copyright infringement in the U.S. District Court for the Southern District of New York.¹⁹ The company moved to dismiss, claiming that it did not own Fox 35; Brody subsequently amended her complaint to add two other affiliates as defendants.²⁰ Fox Broadcasting Company and its affiliates (collectively, “FOX”) maintained that they did not own Fox 35 and that another company owned Fox 35.²¹ After Brody filed her amended complaint, FOX renewed its motion to dismiss pursuant to Rule 12(b)(6), claiming Brody failed to state a claim for copyright infringement because Fox 35’s use of the image constituted fair use.²²

Fair use doctrine is codified at 17 U.S.C. § 107, which states that “[n]otwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . for purposes such as criticism, *comment*, *news reporting*, teaching . . . , scholarship, or research, is not an infringement of copyright.”²³ The Code then lists four nonexhaustive factors to determine whether a use of a copyrighted work is a fair use: (1) the “purpose and character of the use,” (2) the “nature of the copyrighted work,” (3) the “amount and substantiality” of the work used in relation to the work as a whole, and (4) the potential market effect of the use.²⁴ All four statutory factors should be considered and weighed together by courts in a fair use analysis “in light of the purposes of copyright,” and that analysis is holistic, with no one factor being determinative.²⁵

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at *2.

¹⁷ *See id.* at *1–2.

¹⁸ *Id.* at *1.

¹⁹ *Id.*

²⁰ *Id.* at *2.

²¹ *Id.*

²² *Id.*

²³ 17 U.S.C. § 107 (emphasis added).

²⁴ *Id.*

²⁵ *Brody*, 2023 WL 2758730, at *3 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994)).

Typically, fair use is not grounds for dismissing a claim on a 12(b)(6) motion because it is an affirmative defense.²⁶ Technically, an affirmative defense like fair use should be included in a defendant's answer under FRCP Rule 12(c), which occurs after the pleadings are closed.²⁷ Rule 8(c) contemplates affirmative defenses only in the answer rather than in motions to dismiss,²⁸ and, in theory, a 12(b)(6) motion is merely meant to test the sufficiency of the plaintiff's claim, not to consider defenses to it.²⁹ But the distinction is procedurally important because the cost of undertaking the answer, the length of additional proceedings, and the possibility of unnecessarily admitting to various allegations can be alleviated by a 12(b)(6) motion.³⁰ And under Second Circuit precedent, an affirmative defense such as fair use may be used to dismiss a claim on a 12(b)(6) motion "if the defense appears on the face of the complaint."³¹

In this case, Judge Cote held that fair use was "so clearly established on the face of the amended complaint and its incorporated exhibits as to support dismissal."³² In its fair use analysis, the court treated each use of the screenshotted FBI images featured in the broadcast the same. The court held that FOX's use of the FBI image from the criminal complaint in their news segments "unquestionably constitute[d] fair use."³³

First, the court emphasized that, because news reporting is a purpose identified in the fair use statute's preamble, that context created a "'strong presumption' in favor of fair use."³⁴ The court then analyzed the four fair use factors given the facts of this case: the purpose of the use was transformative as it was used in news reporting, promoted commentary, and provided context for the interview; the nature of the copyrighted work was factual and the work had already been published; only one screenshot of the film was used, making the amount and

²⁶ *Id.* at *2 (citing *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 176 (2d Cir. 2018)).

²⁷ *See Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 n.1 (7th Cir. 2012) (cautioning that Rule 12(c) is the technical avenue by which an affirmative defense may be raised rather than Rule 12(b)(6)).

²⁸ FED. R. CIV. P. 8(c).

²⁹ 5 WRIGHT & MILLER, *supra* note 3, § 1366.

³⁰ *See* Nathan Pysno, Note, *Should Twombly and Iqbal Apply to Affirmative Defenses?*, 64 VAND. L. REV. 1633, 1644 (2011) (claiming that "increasingly high costs of discovery necessitated that . . . the motion to dismiss[] also serve as a gatekeeping mechanism to keep spurious claims out of court"); *see also* Anthony Gambol, Note, *The Twombly Standard and Affirmative Defenses: What Is Good for the Goose Is Not Always Good for the Gander*, 79 FORDHAM L. REV. 2173, 2191 & n.155 (2011).

³¹ *Whiteside v. Hover-Davis, Inc.*, 995 F.3d 315, 319 (2d Cir. 2021) (quoting *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008)).

³² *Brody*, 2023 WL 2758730, at *4 (quoting *TCA Television Corp. v. McCollum*, 839 F.3d 168, 178 (2d Cir. 2016)).

³³ *Id.* at *3.

³⁴ *Id.* (quoting *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 477 (2d Cir. 2004)). The court also noted that the amount of work copied may not be as relevant in a news reporting context, where it may be appropriate to reproduce a work in full. *Id.* at *4 (citing *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014)).

substantiality of the copyrighted use slight; and there would be no market effect on the motion picture caused by the use of the screenshot.³⁵ Because each factor so clearly established a classic case of fair use, the court found that the defense was apparent and ruled in favor of FOX, dismissing the case.³⁶

Based upon Second Circuit precedent³⁷ that presumes fair use for news reporting and the analysis of the four fair use factors, the court considered fair use appropriately raised on a motion to dismiss for failure to state a claim.³⁸ *Brody* thus continues the trend of recognizing an affirmative defense in a 12(b)(6) motion in this circuit,³⁹ a trend that has recently expanded to cases of paradigmatic fair use.⁴⁰ This approach is more doctrinally consistent with the goals of fair use and may provide an additional procedural avenue to protect journalists in the news reporting context.

The Second Circuit has recognized the use of affirmative defenses in 12(b)(6) motions,⁴¹ though courts had not granted motions to dismiss on this basis until recently.⁴² Before the Second Circuit extended the practice to the fair use context, the Seventh Circuit faced the question in *Brownmark Films, LLC v. Comedy Partners*.⁴³ In *Brownmark*, the court affirmed that fair use may be raised in a 12(b)(6) motion, reasoning that all relevant facts and documents needed to make the fair use determination were already presented at that stage.⁴⁴ The Second Circuit then explicitly embraced the logic of *Brownmark*,⁴⁵ even in scenarios where the court found that fair use had not been adequately proven at the motion to dismiss stage.⁴⁶ The Southern District of New York had previously rejected a defendant's fair use defense in a motion to dismiss,

³⁵ *Id.* at *4.

³⁶ *Id.*

³⁷ See *NXIVM Corp.*, 364 F.3d at 477 (holding that a news reporting purpose will typically place a thumb on the scale in the defendant's favor on factor one of the fair use analysis).

³⁸ *Brody*, 2023 WL 2758730, at *4.

³⁹ See 5 WRIGHT & MILLER, *supra* note 3, § 1226 (noting the trend across circuits and citing several Southern District of New York cases as examples).

⁴⁰ See cases cited *infra* note 49.

⁴¹ See, e.g., *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008) (“[A] defendant may raise an affirmative defense in a pre-answer Rule 12(b)(6) motion if the defense appears on the face of the complaint.”).

⁴² See cases cited *infra* note 49.

⁴³ 682 F.3d 687 (7th Cir. 2012).

⁴⁴ *Id.* at 690.

⁴⁵ See *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013) (“[T]he Seventh Circuit’s recent decision in [*Brownmark*] is instructive.” (citation omitted)); *BWP Media USA, Inc. v. Gossip Cop Media, LLC*, 87 F. Supp. 3d 499, 505 (S.D.N.Y. 2015) (“[T]he Second Circuit has approvingly cited the Seventh Circuit’s discussion of the fair use inquiry at the motion to dismiss stage.”).

⁴⁶ In *Swatch Group Management Services Ltd. v. Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014), and *TCA Television Corp. v. McCollum*, 839 F.3d 168 (2d Cir. 2016), the Second Circuit acknowledged that fair use may be “so clearly established by a complaint as to support dismissal of a copyright infringement claim,” *id.* at 178, but the court concluded that fair use was not clearly established in each case.

relying in part on the fact that “the defendant [had] not pointed to any cases in this Circuit that have granted a motion to dismiss on the grounds of fair use.”⁴⁷ The “dearth of cases granting such a motion” seemed to cut against resolution of a fair use inquiry at the motion to dismiss stage.⁴⁸ Recently, however, the current has shifted, and *Brody* forms part of a trend of cases in the Second Circuit since then that have recognized paradigmatic fair use raised in a 12(b)(6) motion to dismiss.⁴⁹

Allowing fair use in a 12(b)(6) motion furthers the goals of copyright and journalism. The Second Circuit has recognized that the “ultimate goal of copyright is to expand public knowledge and understanding.”⁵⁰ The doctrine of fair use helps to achieve this goal by “permit[ting] unauthorized copying in some circumstances,”⁵¹ namely those that adhere to and further “copyright’s very purpose, [t]o promote the Progress of Science and useful Arts,”⁵² and news reporting is a historically enshrined way by which public knowledge is expanded and democracy is upheld.⁵³

Importantly for copyright law, allowing fair use to be raised in a 12(b)(6) motion may be more doctrinally consistent with the purposes of fair use than treating it as an affirmative defense.⁵⁴ The statute codifying fair use maintains that fair use of copyrighted material is “not an infringement of copyright.”⁵⁵ An affirmative defense “extends to any claim of a defendant that does not simply deny the facts underlying the claimant’s cause of action.”⁵⁶ Therefore, affirmative defenses may *excuse* conduct, but they do not necessarily indicate that the conduct at

⁴⁷ *M. Shanken Commc’ns, Inc. v. Cigar500.com*, No. 07 Civ. 7371, 2008 WL 2696168, at *10 (S.D.N.Y. July 7, 2008).

⁴⁸ *BWP Media*, 87 F. Supp. 3d at 505.

⁴⁹ See *Hughes v. Benjamin*, 437 F. Supp. 3d 382, 389, 395 (S.D.N.Y. 2020) (granting a motion to dismiss under Rule 12(b)(6) after finding fair use for a competitor’s use of another online filmmaker’s footage due to the use’s transformative purpose for criticism and commentary); *Harbus v. Manhattan Inst. for Pol’y Rsch., Inc.*, No. 19 Civ. 6124, 2020 WL 1990866, at *9 (S.D.N.Y. Apr. 27, 2020) (granting a motion to dismiss under Rule 12(b)(6) for fair use of a photograph for teaching and research purposes); *Yang v. Mic Network, Inc.*, 405 F. Supp. 3d 537, 542, 548 (S.D.N.Y. 2019) (granting a motion to dismiss under Rule 12(b)(6) for fair use of a photograph by an online publisher).

⁵⁰ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 212 (2d Cir. 2015).

⁵¹ *Id.*

⁵² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. CONST. art. I, § 8, cl. 8).

⁵³ See *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

⁵⁴ See generally Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 688 (2015) (“Congress did not intend fair use to be an affirmative defense — a defense, yes, but not an affirmative defense.”).

⁵⁵ 17 U.S.C. § 107.

⁵⁶ Yuval Sinai, *The Doctrine of Affirmative Defense in Civil Cases — Between Common Law and Jewish Law*, 34 N.C. J. INT’L L. & COM. REG. 111, 114 (2008).

issue *did not exist*.⁵⁷ Unlike other affirmative defenses,⁵⁸ fair use does not indicate that a defendant is admitting to the truth of the facts alleged when raising the defense.⁵⁹ Allowing a fair use defense to be raised in a motion to dismiss for failure to state a claim is therefore more consistent with a core idea of the fair use statute: there is no copyright infringement, and therefore there is no claim in the complaint.

Many of these cases involve news reports, which may provide courts an especially compelling context in which to allow fair use to be raised in a 12(b)(6) motion.⁶⁰ News reporting is a statutorily prescribed reason for a fair use defense, though courts must still undertake a “case-by-case analysis”⁶¹ and engage in an “open-ended and context-sensitive inquiry.”⁶² Acknowledging a news reporting context may itself influence the assessment of the factors in the fair use inquiry,⁶³ as it did in *Brody*: Judge Cote noted that the news reporting purpose contributed to finding fair use under the first factor of the analysis.⁶⁴ Strategically built-in language to rightly distinguish this case from *Andy Warhol Foundation*

⁵⁷ 27 TRACY BATEMAN ET AL., FEDERAL PROCEDURE, LAWYERS EDITION § 62:79 (2023) (“An affirmative defense is any matter that serves to excuse the defendant’s conduct or otherwise avoid the plaintiff’s claim . . .”).

⁵⁸ Kevin Smith, *Of Fences and Defenses*, DUKE UNIV. LIBRS. (June 20, 2013), <https://blogs.library.duke.edu/scholcomm/2013/06/20/of-fences-and-defenses> [<https://perma.cc/DC5L-FLSA>] (providing “that fair uses simply fall . . . [o]n the other side of a statutorily-defined ‘fence’” and are thus different from other affirmative defenses).

⁵⁹ See Deborah Hartnett, Note, *A New Era for Copyright Law: Reconstituting the Fair Use Doctrine*, 34 N.Y. L. SCH. L. REV. 267, 276 (1989) (maintaining that this configuration of fair use functions “not as an excuse or privilege for infringement, but as a recognition that *there has been no infringement*”).

⁶⁰ In *Brody*, a photojournalist sued a news outlet for use of their work. 2023 WL 2758730, at *1. Importantly, when conducting fair use analyses involving news reporting, courts must determine whether the use constitutes news reporting on a newsworthy subject. See, e.g., *id.* at *3. Who is considered a journalist and what is considered news reporting, particularly in the modern digital era, are also important considerations for courts. See Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411, 417 (1999). Further, despite the strong presumption of fair use for news reporting, news reporting does not automatically equate to fair use, and the full four-factor, holistic analysis must still be conducted to make the proper determination. See, e.g., *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1123 (9th Cir. 1997) (holding that uses of clips of copyrighted footage in news reporting did not constitute fair use after analyzing the fair use factors).

⁶¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 567–77 (1994).

⁶² *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006).

⁶³ See Leigh Barnwell, *Fair Use and News Reporting — A Fair Use Week Post*, ET SEQ.: HARV. L. SCH. LIBR. BLOG, <https://etseq.law.harvard.edu/2015/02/fair-use-and-news-reporting-a-fair-use-week-post> [<https://perma.cc/XZH3-UXWC>] (claiming that a court’s failure to acknowledge a news reporting context led to an “analysis under the first factor — the purpose and character of the defendant’s use — [that] wasn’t guided by the particular concerns that animate uses for news reporting”); Kevin Smith, *Fair Use, Fixation, and the Problem of Legal Fictions*, HARV. BLOGS: COPYRIGHT HARV. LIBR. (Feb. 25, 2014), <http://blogs.harvard.edu/copyrightosc/2014/02/25/fair-use-week-day-two-with-guest-expert-kevin-smith> [<https://perma.cc/AMY8-TEQQ>] (explaining that transformation is not required in certain fair use contexts, including those like news reporting).

⁶⁴ *Brody*, 2023 WL 2758730, at *3–4.

for the *Visual Arts, Inc. v. Goldsmith*,⁶⁵ which may make transformativeness more fraught in fair use analyses, paired with the finding of fair use in a 12(b)(6) motion, may serve as a countervailing consideration for future courts to utilize this procedural avenue for clearly protected conduct.⁶⁶ Given the Supreme Court's recent treatment of fair use as a matter of law and not of fact,⁶⁷ courts may have more confidence conducting this type of fair use analysis on a 12(b)(6) motion. Though *Brody* holds only persuasive value in the Southern District, courts in the Second Circuit might have a particular interest in following this ruling given that New York City is a global media capital⁶⁸ and the district is home to headquarters of top mass media companies.⁶⁹

Fair use in news reporting contexts is important to maintaining a free press and achieving the goal of copyright law to expand public knowledge.⁷⁰ Upholding procedural avenues by which journalists may defend their reporting, as the court did here, further helps to achieve copyright goals given the judiciary's authority on fair use.⁷¹ Many courts' reluctance to "define the parameters of fair use protection" for journalists "leaves the journalistic community without notice as to what it can and cannot do . . . [which] may have a chilling effect on journalists, since the constraints upon the journalist's reporting will be entirely left to the discretion of the judiciary."⁷² To succeed under fair use, journalists must first be able to raise a fair use defense. Allowing this additional procedural avenue to pursue a fair use defense could spare journalists valuable time, money, and resources since they may avoid the discovery phase of litigation for classic fair use cases.⁷³ Providing

⁶⁵ 11 F.4th 26 (2d Cir. 2021), *aff'd*, 143 S. Ct. 1258 (2023). Interestingly, *Brody* was decided on April 3, 2023, after the Second Circuit's decision in *Warhol* was rendered and after the Supreme Court granted certiorari, but before the Court ruled on the case. Even so, Judge Cote preemptively built language into the opinion to decidedly hold that the Supreme Court's decision in that case would not impact the fair use analysis in this case because it "involve[d] a clear-cut application of the fair use factors in the context of news reporting." *Brody*, 2023 WL 2758730, at *3. The court rightfully distinguished *Warhol* from this case as *Brody* depicts clear-cut fair use in a news context while *Warhol* implicates distinct questions of transformative use and commercial purposes. *See id.*; *Warhol*, 143 S. Ct. at 1274–75.

⁶⁶ *Brody*, 2023 WL 2758730, at *4.

⁶⁷ *See* *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1209 (2021).

⁶⁸ *See* Felix Richter, *New York Is the World's Media Capital*, STATISTA (Mar. 11, 2015), <https://www.statista.com/chart/3299/new-york-is-the-worlds-media-capital> [<https://perma.cc/4K5J-NSSW>].

⁶⁹ *See* *Top 100 Media Companies*, STATISTA, <https://www.statista.com/companies/ranking/6/top-100-media-companies> [<https://perma.cc/33UQ-HHVH>].

⁷⁰ *See* Patricia Aufderheide et al., *Copyright, Free Speech, and the Public's Right to Know*, 14 JOURNALISM STUD. 875, 875 (2013) ("Without vigorous application of fair use, freedom of the press and its public sphere functions are impaired.")

⁷¹ *See, e.g.*, Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 58 (2002) (discussing the power courts wield in copyright cases).

⁷² Cecilia Loving, Note, *Fair Use Protection for News Reporting: Where Does the First Amendment Stand?*, 13 N.Y.U. REV. L. & SOC. CHANGE 647, 664 (1985).

⁷³ *See generally* Pysno, *supra* note 30.

additional ways for journalists to defend against copyright infringement claims on newsworthy subjects, particularly avenues that may be less time intensive or costly, may help alleviate stress on the journalism profession⁷⁴ and decrease chilling effects.⁷⁵

Overall, the *Brody* decision advances the goals of fair use doctrine and helps protect the journalism profession in the modern era.⁷⁶ Early dismissals of copyright infringement claims on fair use grounds in a 12(b)(6) motion can help avoid frivolous lawsuits and chilling effects in news media.⁷⁷ At a time when journalism and press freedom are distinctly under threat worldwide,⁷⁸ it is imperative that information continues to be provided as a public good. The procedural trend in the Second Circuit — embraced by and carried on in *Brody* — helps to ensure that this remains possible in the most efficient manner for news reporters while bringing the circuit’s case law into better accord with fair use doctrine as a whole.

⁷⁴ See *Threats to Media Workers’ Freedom “Growing by the Day,” UN Chief Warns*, UNITED NATIONS (May 3, 2022) [hereinafter *Threats to Media Workers’ Freedom*], <https://news.un.org/en/story/2022/05/11117362> [<https://perma.cc/8M9W-XJU8>] (discussing mounting stresses in the journalism profession, including harassment and intimidation).

⁷⁵ Judith Townend, *Freedom of Expression and the Chilling Effect*, in *THE ROUTLEDGE COMPANION TO MEDIA AND HUMAN RIGHTS* 73, 73 (Howard Tumber & Silvio Waisbord eds., 2017) (claiming that chilling effects include “high legal costs that provoke uncertainty and fear among writers and journalists”).

⁷⁶ See generally *Threats to Media Workers’ Freedom*, *supra* note 74; Karin Wahl-Jorgensen et al., *The Future of Journalism: Risks, Threats and Opportunities*, 17 *JOURNALISM STUD.* 801, 801–03 (2016).

⁷⁷ See Aufderheide et al., *supra* note 70, at 875, 879 (stating that journalists may delay or choose not to release information due to inadequate fair use advice and providing an example of frivolous copyright litigation being strategically wielded as a business model); Townend, *supra* note 75, at 75 (showing that scholars admit the chilling effect may “vary between different types of publications”).

⁷⁸ See, e.g., Audrey Azoulay, Director-General, UNESCO, Opening Remarks on the 30th Anniversary Event of World Press Freedom Day Global Conference (May 2, 2023), <https://media.un.org/en/asset/k1d/k1dy78dn8s> [<https://perma.cc/4VF7-CQTN>] (claiming that 2022 was the deadliest year for journalists after eighty-six journalists were killed and still more journalists were attacked or imprisoned); Amy Watson, *United States: Press Freedom Index in the United States from 2013 to 2023*, STATISTA (June 26, 2023), <https://www.statista.com/statistics/1233156/press-freedom-index-panama> [<https://perma.cc/KV3B-PXC3>] (providing a chart with data sourced from Reporters Without Borders that shows declining press freedom in the United States from 2013 to 2023).